Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No. 02-5816

IN THE SUPREME COURT of the UNITED STATES

Robert W. Grine II, Joanne D. Grine, Estate of Margaret M. Grine,
Petitioners
v.
WILLIAM R. COOMBS; BILLIE M. YOST; JACK W. SHRUM, ET UX.; ROTOCAST PLASTIC; ESSEX ENVIRONMENTAL INDUSTRIES, INC.; TIONESTA BOROUGH COUNCIL; RONALD HALL, President of Borough Council, in an individual and official capacity; SCOTT DAUM, Borough Manager of Tionesta, in an individual and official capacity; COMMONWEALTH OF PENNSYLVANIA-DEPARTMENT OF ENVIRONMENTAL PROTECTION ("DEP"); GARY WOZNIAK, in an individual and official capacity as an agent of the DEP; RONALD W. COOMBS, Executor of the Estate of WILLIAM R. COOMBS, DECEASED; UNITED STATES OF AMERICA ENVIRONMENTAL PROTECTION AGENCY ("EPA"); MICHAEL McCABE, Regional Administrator, Region III, U.S. EPA
Respondents

On Petition for a Writ of Certiorari
To the Third Circuit Court of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

I. Whether the Third Circuit Court of Appeals violated the Petitioners' rights to fundamental fairness and due process because it refused to relinquish its jurisdiction in compliance with the governing rules of federal appellate procedure?

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WILLIAM R. COOMBS; BILLIE M. YOST; JACK W. SHRUM, ET UX.; ROTOCAST PLASTIC; ESSEX ENVIRONMENTAL INDUSTRIES, INC.; TIONESTA BOROUGH COUNCIL; RONALD HALL, President of Borough Council, in an individual and official capacity; SCOTT DAUM, Borough Manager of Tionesta, in an individual and official capacity; COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION ("DEP"); GARY WOZNIAK, in an individual and official capacity as an agent of the DEP; RONALD W. COOMBS, Executor of the Estate of WILLIAM R. COOMBS, DECEASED; UNITED STATES OF AMERICA ENVIRONMENTAL PROTECTION AGENCY ("EPA"); MICHAEL McCABE, Regional Administrator, Region III, U.S. EPA

Respondents

Petition for a Writ of Certiorari
To the United States Court of Appeals
For the Third Circuit

Petitioners respectfully pray that a writ of certiorari issue to review the orders of the United States Court of Appeals for the Third Circuit entered in this proceeding on March 28, 2003.

OPINIONS BELOW

The United States Court of Appeals' order of January 8, 2003 summarily granting the Rule 27 motion jointly submitted by the federal appellees, the U.S. EPA and Michael McCabe, and a non-federal entity, Scott Daum, to dismiss the appeal for lack of jurisdiction over the subject matter appears at Appendix A (App.A). It is unreported

The United States Court of Appeals' summary order of March 28, 2003, denying the appellants' Petition for Rehearing appears at Appendix B (App. B), and it is unreported.

The U.S. District Court order of September 26, 2002, denying the appellants' motion to vacate the court's orders of September 25 and August 12, 2002, as nullities, appears at Appendix C (App. C.) It is unreported.

GROUNDS FOR JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). The order of the United States Court of Appeals summarily granting the U.S. EPA's and Scott Daum's joint Rule 27 Motion to Dismiss the Appeal at No. 02-3816 for lack of subject-matter jurisdiction was entered on January 8, 2003. The Court of Appeals denied Petitioners' timely Petition for Rehearing on March 28, 2003. The Court of Appeals never formally relinquished its jurisdiction subsequent to March 28, 2003. A certified copy of the order of January 8, 2003, was filed with the district court on January 10, 2003.

The question presented did not arise until the United States Court of Appeals granted the federal and non-federal entities' joint Rule 27 Motion to dismiss the appeal for lack of jurisdiction over the subject matter. Petitioners thereupon

sought rehearing and argued that the Court of Appeals had erred for numerous reasons and that its decision resulted in fundamental unfairness and a violation of the due process clause of the federal constitution.

The jurisdiction of the United States District Court for the Western District of Pennsylvania was invoked pursuant to 28 U.S.C. §1331.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case concerns the Fifth Amendment to the United States Constitution which provides, in pertinent part, that "No person shall . . . be deprived of life, liberty, or property, without due process of law; . . ."

STATEMENT OF THE CASE

On October 23, 2001, the district court certified pursuant to Rule 54(b) its order dismissing the Petitioners' amended complaint against the U.S. EPA.

On April 27, 1998, petitioners had opposed the U.S. EPA's motion for Rule 54(b) certification of the court's order dismissing claims against the federal defendants. Through its certification of this order, the district court characterized the dismissal order as final and appropriate for immediate appeal.

In the hearing of October 19, 2001, the district court certified its order for immediate appeal and simultaneously attempted to stay the appeal indefinitely. Petitioners had no choice but to file an immediate appeal of an order characterized by the district court as ripe for an immediate appeal. Their appeal was docketed at No. 01-4118 and scheduled for full briefing on December 18, 2001, by the Court of Appeals.

On January 14, 2002, the federal defendants in a Rule 27 motion represented that the district court acted with great propriety in certifying an order for immediate appeal and then staying the appeal until the end of the case, and asked the appellate court to dismiss the appeal of that certified order for lack of jurisdiction over the subject matter. The Court of Appeals summarily dismissed for lack of subject-matter jurisdiction over the appeal of an order certified

pursuant to Rule 54(b) by the district court. The Court of Appeals apparently never assessed the propriety of the district court's Rule 54(b) certification of the order in question.

Appellants filed a timely petition for rehearing of the order of February 27, 2002, on April 11, 2002; that petition was denied by the appellate court on April 23, 2002. Appellants realized when they attempted to procure the record from the clerk at the appellate court that the record had been certified to the district court on February 27, 2002, 45 days prior to the deadline for submission of a timely filed petition for rehearing. Appellants believed that the clerk of court had prematurely issued the mandate in violation of the plain language of Fed. R. App. Proc. Rule 41(d). Appellants requested on August 27, 2002 that correction or revision of the record be effected; on August 29, 2002, a clerk denied this Rule 27 motion and in doing so stated that the mandate had in her estimation issued on February 27, 2002; "the February 27, 2002 order dismissing the appeal was certified to the district court on the date that it was issued." In effect, the appellants realized that they had been stripped of their right to submit a petition for rehearing in the expectation of meaningful review because the Court of Appeals on February 27, 2002, informed the district court that the appellants' Petition for Rehearing would be denied, without review, since the appellate court was relinquishing jurisdiction to the district court in advance of any review of the petition for rehearing.

On July 19, 2002, at No. 02-218, appellants filed a Petition for Certiorari with the U.S. Supreme Court. The federal defendants in their brief in opposition to the petition for certiorari directly contradicted the statements made in their Rule 27 motion for dismissal, which emphasized the complete propriety of the district judge's actions; however, in their brief in opposition, they characterized the conduct of the district court judge as self-defeating; i.e., wrong as a matter of law. The federal defendants at this point admitted that the

appeal was improperly certified. The U.S. Supreme Court denied the plaintiffs' petition for certiorari on November 18, 2002.

On August 12, 2002, the district court judge entered orders dismissing the complaint against Scott Daum for insufficiency of service, and entered a second order denying the plaintiffs' motion to conform the EPA's pleadings to its proof.

On September 24, 2002, plaintiffs filed a motion to vacate all orders filed by the district court subsequent to April 23, 2002, for lack of jurisdiction over the subject-matter of their cause of action, on grounds that the Court of Appeals failed to issue the mandate in compliance with Fed. R. App. Proc. Rule 41(d), and instead prematurely relinquished its jurisdiction. In the hearing of September 26, 2002, the district court judge denied the plaintiffs' motion to vacate and set deadlines for completion of discovery and plaintiffs' response to a summary judgement motion by the executor of the Coombs estate. He set further deadlines in his published order of September 26, 2002.

On October 8, 2002, plaintiffs appealed from the orders of August 12, 2002 and the order of September 26, 2002, denying their motion to vacate the court's orders as nullities. Their appeal was docketed on October 16, 2002 at no. 02-3816.

The case was on appeal at No. 02-3816 from October 8, 2002 at least through March 28, 2003. The mandate should have issued at the earliest on April 4, 2003. All discovery activities in the district court were precluded due to the pendency of this appeal. No activity whatsoever should have taken place in the district court during this period.

On November 13, 2002, a Rule 27 motion was jointly filed by the federal appellees, EPA and Michael McCabe, and a non-federal appellee, Scott Daum, who was not a proper

party to the appeal, to dismiss the appeal for lack of subject-matter jurisdiction.

Plaintiffs responded with their reply to this motion on November 25, 2002. On January 8, 2003, the Rule 27 motion of federal and non-federal appellees to dismiss for lack of subject-matter jurisdiction was summarily granted. On January 10, 2003, a certified copy of the order of January 8, 2003 was transmitted to the district court. A timely petition for rehearing was filed by plaintiffs on February 19, 2003, and summarily denied on March 28, 2003. Plaintiffs immediately motioned to the Court of Appeals to stay the mandate on April 2, 2003; defendants petitioned for leave to file a response out of time to this motion. The clerk of court responded on April 25, 2003, by stating that the plaintiffs' motion could not be considered or reviewed; instead she represented that no action whatsoever would be taken in response to the submission of plaintiffs' motion because no case-dispositive order had been entered and thus no mandate would ever issue in regard to plaintiffs' appeal.

Plaintiffs then submitted a motion to stay the mandate at No. 02-3816 pending the filing of a petition for certiorari to the U.S. Supreme Court.

On January 17, 2003, when the district court convened the litigants and sought to amend its challenged order of September 26, 2002, plaintiff-appellants were only 9 days into the time period allotted for submission of their petition for rehearing at No. 02-3816; and did not file it until February 19, 2003. Plaintiffs were of the opinion that jurisdiction followed the mandate, which could not issue until 7 days subsequent to the entry of the order denying their petition for rehearing. The appellate order denying their petition for rehearing was not issued until March 28, 2003.

REASONS FOR GRANTING THE WRIT

I. The decision of the Third Circuit Court of Appeals conflicts with this Court's precedents and with settled law in the Third Circuit.

The United States Court of Appeals for the Third Circuit deliberately refused to relinquish jurisdiction to the district court in compliance with Fed. R. App. Proc. Rule 41; i.e., the Court of Appeals, through its clerk, never properly relinquished jurisdiction subsequent to its review of appellants' timely-filed petition for rehearing of a case-dispositive order.

The timely filing of a notice of appeal is an event of jurisdictional significance immediately conferring jurisdiction on a Court of Appeals and divesting a district court of those aspects of the case involved in an appeal. Griggs v. Provident Consumer Discount Co., 103 S. Ct. 400 (1982); Marrese v. American Academy of Orthopedic Surgeons, 105 S. Ct. 1327 (1985); Hovey v. McDonald, 3 S. Ct. 136 (1883); Bensalem Tp. v. International Surplus Lines Co., 38 F.3d 13030, reh. and reh. den., on remand 1995 WL 290438, aff'd. 77 F.3d 461 (3rd Cir. 1994); Sheet Metal Workers Intern. Ass'n. Local 19 v. Herre Bros., Inc., 198 F.3d 391 (3rd Cir. 1999); Venen v. Sweet, 758 F.2d 117 (3rd Cir. 1985).

The Court of Appeals and its personnel do not possess the authority to pre-judge the outcome of an appeal that is non-frivolous and timely-filed.

The Court of Appeals certified an order summarily dismissing the appeal at 01-4118 for lack of subject matter jurisdiction to the lower court on the day that the motion was denied, and forty-five days in advance of the time allotted for filling of a petition for rehearing.

When the appellants addressed to the Court a Rule 27 motion for correction of the record, a response was issued by the circuit's clerk, who stated that the order dismissing the appeal was certified to the district court on February 27, 2002, and also announcing her view that the court never exercised jurisdiction over the appeal at 01-4118.

In regard to duration of preclusion, the Third Circuit has spoken as follows:

"The mandate of the Court of Appeals serves to fix with certainty the point at which jurisdiction passes from the appellate to the trial court ... only at that point [does] the appeal process become complete and the excludable time end." U.S. v. Felton, 811 F.2d 190, 198 (3rd Cir. 1987).

The Court of Appeals most definitely did exercise its jurisdiction over the subject matter of the appeal at 01-4118, though it made no decision on the merits. Its jurisdiction as asserted was exclusive. When the court says through its clerk that it has never issued the mandate, this is true; it never issued the mandate in compliance with R. 41, i.e., after the petition for rehearing of a case-dispositive order was timely-filed and (in theory) reviewed.

The Court of Appeals always has jurisdiction to determine whether it has the authority to entertain and adjudicate an appeal. See USM Corp. v. GRN Fasteners, Ltd., 574 F.2d 17 (1st Cir. 1978). The Court thus retains jurisdiction to determine its own jurisdiction. Ocampo-Duran v. Ashcroft, 254 F.3d 1133 (9th Cir. 2001). Furthermore, the Court could not determine that it lacked jurisdiction over the appeal in advance of adjudication of that issue. The Court never raised the question of jurisdiction on its own motion; instead the Court exercised its jurisdiction over the appeal when it docketed the notice of appeal, issued its transcript purchase order, issued its order requiring the filing of disclosure statements, appearance statements, information statements and concise summaries of the case. It also exercised its

exclusive jurisdiction when it issued an order laying out the briefing schedule.

The Court of Appeals continued to exercise its jurisdiction over the appeal at 01-4118 when it ruled upon a Rule 27 motion submitted by the federal appellees, and duly opposed by appellants.

This issue was not finally adjudicated by the Court of Appeals until after it had decided the disposition of a timely-filed petition for rehearing. The Court of Appeals could not determine the scope of its appellate jurisdiction until it granted or denied the petition for rehearing. It could not finally determine that it lacked jurisdiction over the appeal until it initiated and completed its review of the petition for rehearing.

Appellate jurisdiction is primarily an issue for the appellate court, and, therefore, if an appeal is taken from an interlocutory order and the issue of appealability is in doubt, the district court should stay its hand until the appellate court resolves the issue of its jurisdiction, or remands for further clarification of that issue.

The district court judge did not ever use his power to certify the frivolity of an interlocutory appeal.

Thus under no circumstances could the Court of Appeals determine that it lacked jurisdiction over the subject-matter of the appeal in advance of its review of the timely-filed petition for rehearing.

Thus after this determination was made, it had a duty to relinquish its jurisdiction to the lower court.

If the Court of Appeals has determined that it lacks jurisdiction over the subject-matter of an appeal, issuance of the mandate must follow the opinion or order of dismissal by

time sufficient to permit the filing of motions provided for in the federal rules governing mandates.

If, as the clerk represented, the Court made a final determination on February 27, 2002, through certification and release of the record to the court below, on the day that a Rule 27 motion was granted, the Court effectively announced to the court below that appellants could only lose in the Court of Appeals, and instructed the district court judge that their petition would be denied without review.

Alternatively, if the Court of Appeals did not refrain from exercising its jurisdiction to review the petition for rehearing, and never properly relinquished its jurisdiction to the lower court subsequent to that adjudication, then technically the appeal is still pending.

If the Court of Appeals never retained exclusive jurisdiction to hear the petition, appellants were denied due process of law because their petition was denied without review.

If the Court of Appeals did exercise jurisdiction over the appeals at Nos. 01-4118 and 02-3816, and never properly relinquished its jurisdiction to the court below, the plaintiff-appellants were subjected to the dictates of a court divested by still pending appeals of the power to write new orders or proceed to trial.

"It is certainly a generally established legal principle that a district court lacks the power to act in a matter while an appeal is pending in such matter. See SEC v. Investors Security Corp., 500 F.2d 561, 568 (3rd Cir. 1977)." Sansom Committee by Cook v. Lynn, 735 F.2d 1552, 1554 (3rd Cir. 1984). It is also beyond debate that jurisdiction follows the mandate. See U.S. v. Russo, 550 F. Supp. 1315 (D.N.J. 1982), aff'd. 722 F.2d 736 (3rd Cir. 1983).

Thus the district court was divested of jurisdiction during the pendency of an interlocutory appeal. See Sheet Metal

Workers; Bowes v. National Collegiate Athletic Ass'n., 188 F. Supp. 2d 473 (D.N.J. 2002).

In the instant case, the district court lacked jurisdiction to enter new orders on September 26, 2002, due to the pendency of the prior appeal filed at No. 01-4118. Even a timely notice of appeal from a non-appealable order divests the district court of jurisdiction. See District 65, Distributive, Processing & Office Workers Union v. McKague, 216 F.2d 153 (3rd Cir. 1954). The appeal taken at No. 01-4118 was of course taken from an order certified by the district court for immediate appeal, pursuant to Rule 54(b). In no sense could it be characterized as an unappealable order by the judge, given the fact of his decision to certify the order as ripe for immediate appeal.

Because the plaintiffs' initial appeal was taken from what in effect was an order characterized by the district court as an appealable order, the district court did not retain the power to act during the pendency of that appeal at No. 01-4118.

Any orders of the district court touching upon the substance of the matter on appeal are considered null and void if entered subsequent to the timely filing of the notice of appeal.

On the Third Circuit, even a timely notice of appeal from a non-appealable order divests the district court of jurisdiction. See District 65.

Pre-judging the outcome of an appeal, it would seem, is not the same thing as relinquishing jurisdiction to a district court in compliance with Fed. Rule App. Proc. Rule 41.

After a Court of Appeals determines an appeal, it issues a mandate to the district court. A certified copy of the judgement of the Court of Appeals, and a copy of the opinion of the court, if any, and any direction as to costs constitutes the mandate of the Court of Appeals. Fed. R. App. P. Rule

this practice, as evidenced by the format it did utilize in the past in sending to the district court a certified order issued in lieu of a formal mandate. The Court of Appeals also effected service upon counsel of record in taking this approach to issuance of the mandate.

The timely filling of a petition for panel rehearing, petition for rehearing en banc, or motion for stay of the mandate, stays the mandate until disposition of the petition or motion, unless the court orders otherwise. Fed. R. App. P. Rule 41(d)(1).

Unless the time is shortened or enlarged by order, the mandate of the Court of Appeals issues 7 days after the time to file a petition for rehearing expires, or 7 days after entry of an order denying a timely petition for panel rehearing, rehearing en banc, or motion for stay of the mandate, whichever is later. Fed. R. App. P. Rule 41(b).

No party to this appeal moved that the time for issuance of the mandate be shortened. No one attempted to make a showing of grounds for such a motion. No party to this appeal ever asked for a stay of the mandate at No. 01-4118.

Only in exceptional circumstance will a panel order the mandate to issue immediately upon the filing of a disposition, as where a petition for rehearing, suggestion for rehearing en banc, or petition for writ of certiorari would be legally frivolous, or where an emergency situation requires that the action of the court become final and mandate issue at once. Advisory Comm. Notes to CA9, Rule 41-1.

The appellate court did not order immediate issuance of the mandate, nor did it serve notice on appellants' counsel of record as to its premature certification of the record.

The clerk's office must execute certain established procedures which themselves constitute issuance of the mandate. See U.S. v. Rivera, 844 F.2d 916 (2d Cir. 1988).

As held in Rivera, jurisdiction follows the mandate; that is, the effect of the mandate is to bring the proceedings in a case on appeal to a close and to remove it from the jurisdiction of the appellate court, returning it to the court below. Thus the appeal does not become final until the date on which the mandate is issued by the clerk of court.

"...[T]he mandate is not deemed issued merely upon the filing of an opinion or summary order." Rivera, at 921. Given this precedent, it is the date on which the mandate is issued that determines when the district court reacquires jurisdiction for further proceedings.

"Just as the notice of appeal transfers jurisdiction to the Court of Appeals, so the mandate returns it to the lower court. Until the mandate issues, the case is 'in' the Court of Appeals, and any action by the district court is a nullity. United States v. Wells, 766 F.2d 12, 19 (1st Cir. 1985); Zaklama v. Mt. Sinai Medical Center, 906 F.2d 645, 649 (11th Cir. 1990); 16 Charles Alan Wright, Arthur R. Miller, Edward H. Cooper & Eugene Grossman, Federal Practice & Procedure, §3949 at 359 (1977)." Kusay v. U.S., 62 F.3d 192, 194 (7th Cir. 1996). Plainly, once a plaintiff files a timely, non-frivolous notice of appeal, the district court loses jurisdiction over the case and does not regain jurisdiction until the Court of Appeals issues its mandate of affirmance, notwithstanding the fact that a dismissal of an appeal has been filed at an earlier date.

The Court of Appeals had exclusive jurisdiction to adjudicate the timely petition for rehearing submitted to the Court of Appeals by plaintiff-appellants at No. 02-3816 on February 19, 2003, and did so, using judges in active service on March 28, 2003.

For all of these reasons, the district court judge should have stayed his hand until the appellate court finally resolved, through adjudication of the petition for rehearing, and release of its mandate, the issue of its jurisdiction. See State ex. Rel.

of its mandate, the issue of its jurisdiction. See State ex. Rel. Nixon v. Coeur d'Alene Tribe, 164 F.3d 1102 (8th Cir. 1999), reh. and sugg. for reh. den., cert. den., Coeur d'Alene Tribe v. Missouri ex. rel. Nixon, 119 S. Ct. 2400. Accord: City of Los Angeles, Harbor Div. v. Santa Monica Bay Keeper, 254 F.3d 882 (9th Cir. 2001).

It is also unseemly for an appellate court to entertain a motion from a person who is not a party to the appeal. Because Scott Daum was not a party who had standing to defend on the merits in the district court, he was not a proper party to the appeal at No. 02-3816. The Court of Appeals lacked jurisdiction to grant a motion submitted by a non-party to the appeal.

As Judge Easterbrook said in Kusay, "we do not think the mandate's role in transferring jurisdiction some archaic precept that has outlived its usefulness; jurisdiction is power to act, and it is essential to have clear rules that define who, if anyone, possesses this power. Budinich v. Becton Dickenson & Co., 486 U.S. 196, 202 (1988); Helm v. RTC, 18 F.3d 446 (7th Cir. 1994)." Kusay, at 194.

The Court of Appeals apparently never complied with Fed. R. App. Proc. Rule 41(d)(2)(D): The Court of Appeals must issue the mandate immediately when a copy of a Supreme Court order denying the petition for certiorari is filed. At No. 01-4118 (S. Ct. No. 02-218), the Supreme Court's order dated November 18, 2002, denying a petition for certiorari by appellants, was filed with the Court of Appeals. No mandate would ever issue subsequent to that date, according to the clerk's communications with the plaintiff-appellants of August 29, 2002.

Although issuance of the mandate is largely a formality, the Court of Appeals retains jurisdiction over a case until it issues, and the district court cannot proceed in the interim. Youghiogheny v. Ohio Coal Co. v. Milliken, 200 F.3d 942

The Court of Appeals could not of course legitimately sit to adjudicate the petition for rehearing if it had relinquished jurisdiction to the district court. Alternatively, the district court could not go forward or take any action in the case if the appellate court had not issued its mandate.

Either the Court of Appeals ruled on the petition for rehearing without recalling its mandate after its premature issuance on February 27, 2002, or the district court went forward and issued case-dispositive orders in the absence of jurisdiction over the subject-matter of plaintiffs' case, because the mandate had never formally issued in compliance with Fed. R. App. Proc. Rule 41.

The Court of Appeals apparently made the mistake of prematurely issuing the mandate without court order or notice to counsel of record. As stated in the Notes of the Advisory Committee on the 1998 amendments to the rules (Rule 41) "unless the court orders that the mandate issue earlier than provided in the rule, the parties can easily calculate the anticipated date of issuance and verify issuance with the clerk's office. In those instances in which the court orders earlier issuance of the mandate, the entry of the order on the docket alerts the parties to that fact." (Emphasis supplied.) No such order was ever written in or by the Court of Appeals.

As a matter of law, the Court of Appeals could not relinquish jurisdiction to the district court on February 27, 2002, and then take up consideration of the petition for rehearing in April of 2002. But this is precisely what the court did. Through its premature issuance of the mandate, the Court of Appeals made up its mind as to what it would do with plaintiffs' petition for rehearing, and communicated that decision to the district court before it ever laid eyes on the petition.

Alternatively, the district court lacked jurisdiction over the subject matter of Plaintiffs' cause on September 26, 2002, because the Court of Appeals never issued the mandate in compliance with Fed. R. App. Proc. Rule 41. Instead, the Court of Appeals through its clerk defended the premature issuance of the mandate and proposed an even more radical departure from the rule: the Court denied the necessity of any on-the-record transfer of the case from its exclusive jurisdiction back down to the venue and control of the district court.

If the district court retained jurisdiction through the filing of the notice of appeal up until the denial of a petition for rehearing by the appellate court, both courts were in session at the same time. Venen forbids such simultaneous activity in both the district and appellate court systems.

As the court has made clear in the context of its own internal operating procedures, "a petition for rehearing of a case-dispositive ruling is referred to the court en banc according to the procedures for petitions for rehearing." (Emphasis supplied.)

Non-case-dispositive rulings are not referred to the court en banc. (10.3.3. Procedure.)

Non-frivolous notice of interlocutory appeal following a district court's certification of a dismissal order pursuant to Rule 54(b) does divest the district court of jurisdiction to proceed. See Williams v. Brooks, 996 F.2d 728 (5th Cir. 1993); Stewart v. Donges, 915 F.2d 572, 575-76 (10th Cir. 1990).

Because the district court did not certify this interlocutory appeal as frivolous or forfeited, the district court was automatically divested of jurisdiction to proceed with trial. See Chuman v. Wright, 960 F.2d 104, 105 (9th Cir. 1992).

Failure to establish on the record the date of relinquishment of the case to the district court makes it impossible for the litigants to know how much time was excluded from consideration for purposes of discovery and the writing of dispositive motions prior to trial.

Appellants asked the district court for clarification on this point; the district court judge refused to answer when asked on what date the relinquishment of jurisdiction took place, in the hearing of September 25, 2002.

Appellants also requested guidance and clarification on this point from the Court of Appeals; their motion which was duly submitted to the Court was disposed of by a clerk, who advanced her theory that the mandate issued before the petition for rehearing was reviewed; she also expressed her belief that jurisdiction was never retained or exercised by the Court of Appeals.

But, as stated in the Notes of the Advisory Committee on 1998 amendments to Rule 41, at subdivision (c), "a Court of Appeals' judgment or order is not final until issuance of the mandate; at that time the parties' obligations become fixed." (Emphasis supplied.)

Appellants had every right to file a motion for stay of the mandate pending petition to this U.S. Supreme Court for a writ of certiorari in the Court of Appeals, at 02-3816.

The Court knew that it would have to issue the mandate 7 days after entering an order denying the motion, as per Rule 41(d)(1) and (2). The Court through its clerk refused to entertain the motion for stay submitted by appellants, and instead through its clerk represented that no mandate "has, or will, issue in the appeal at No. 02-3816."

The clerk (as clerk) could not amend or modify the same order issued by judges in active service; this is beyond her powers. The judges proceeded in a summary fashion and

provided no explanation for their decisions. The clerk cannot provide it for them after the fact, or amend their orders after they issue.

It is the appellants' position that the Court of Appeals asserted its exclusive jurisdiction over the appeals at 01-4118 and 02-3816, and the Court of Appeals had a duty, in both of those appeals, to issue its mandate in full compliance with the federal rules of procedure.

It is said in the order of March 28, 2003, that the petition for rehearing filed by appellants was submitted "to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service ..." (Emphasis supplied.) Appellants take this to mean that judges made the decision to deny the appellees' and Scott Daum's Rule 27 motion and that circuit-court judges and not a district court judge took charge of the treatment of the petition for rehearing.

It is fair to ask who or what is making disposition of this case, if at this juncture it isn't the Court of Appeals.

The district court was indeed divested of its jurisdiction during the pendency of the appeal at 01-4118, and during the pendency of the appeal taken at 02-3816. The district court judge could not retain control in the belief (however close to the truth it may be) that appellants could only lose in the Court of Appeals; nor could the district court retroactively dispose of his power to run the case if appellants ever won in the Court of Appeals.

Given the existing precedent on this subject, it was an impossibility for the district court to retain jurisdiction of the whole case on the merits throughout the pendency and disposition of the appeal at No. 01-4118, and/or the appeal at No. 02-3816.

It is the law in this circuit that the Court of Appeals retains its jurisdiction over an appeal until it issues its mandate. See Felton, Bensalem; and Russo.

It is a denial of the petitioners' fundamental right to due process of law and a violation of their statutory and constitutional right of access to the courts for the Court of Appeals to refuse to make an on-the-record transfer of the petitioners' case back to the forum from whence it came; i.e., the district court.

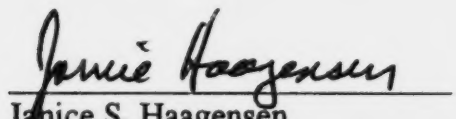
The district court's writing of orders, prior to on-the-record issuance of the mandate, is an usurpation of the powers of the Third Circuit Court of Appeals. The appellate court's willingness to pre-judge the outcome of its treatment of a non-frivolous petition for rehearing effectively aids and abets the district court's violation of the petitioners' most fundamental rights.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Dated: June 25, 2003.

Respectfully submitted,



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APPENDIX

Appendix A	Order of January 8, 2003, of the U.S. Court of Appeals for the Third circuit granting the federal appellees' and a non-federal entity's Rule 27 Motion to Dismiss the Appeal at No. 02-3816
Appendix B	Order of March 28, 2003, of the U.S. Court of Appeals denying the Appellants' Petition for Rehearing
Appendix C	District Court Order of September 26, 2002, denying the appellants' motion to vacate all orders entered by the district court subsequent to April 23, 2002

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

November 20, 2002
B-20

No. 02-3816

ROBERT W. GRINE, II, et al., Appellants
v.
WILLIAM R. COOMBS, et al.
(Western District of PA (Erie) D.C. No. 95-cv-00342) (SJM)

Present: SCIRICA, BARRY, AND AMBRO, Circuit Judges.

1) Joint Motion of Federal Appellees, EPA and Michael McCabe, and Non-Federal Appellee Scott Daum to Dismiss Appeal for Lack of Appellate Jurisdiction, or in the alternative for Summary Affirmance.

2) Appellants' Response to Federal Appellees' and Non-Federal Entities motion to Dismiss the Appeal for lack of Subject-Matter Jurisdiction.

3) Appellees' Reply to Appellants Response to Joint motion of Federal Appellees and Non-Federal Appellee, Scott Daum to dismiss Appeal for Lack of Appellate Jurisdiction, or in the alternative for Summary Affirmance.

Rebecca Simon 267-299-4947
Case Manager

Copy of clerk's 11/20/02 Order
Sent for Court's Information.

ORDER

The foregoing joint motion of Federal Appellees, EPA and Michael McCabe, and Non-Federal Appellee, Scott Daum, to dismiss appeal for lack of appellate jurisdiction is granted.

By the Court
S/ A. Scirica
Circuit Judge

Dated: Jan 08 2003
RLS/cc: JSH (JTS
SBM (MJS
BPS

Marcia M. Waldon,
Clerk

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 02-3816

ROBERT W. GRINE, II; JOANNE D. GRINE;
ESTATE OF MARGARET M. GRINE,
Appellants

v.

RONALD W. COOMS, Executor of the Estate of WILLIAM R. COOMBS, DECEASED; BILLIE M. YOST; JACK W. SHRUM; ROTOCAST PLASTIC PRODUCTS; ESSEX ENVIRONMENTAL INDUSTRIES, INC.; TIONESTA BOROUGH COUNCIL, OF FORREST COUNTY; RONALD HALL, President of borough Council, in an individual and official capacity; SCOTT DAUM, BOROUGH MANAGER OF TIONESTA, in an individual and official capacity; COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION ("DEP"); GARY WOZNIAK, in and individual and official capacity as agent of the DEP; DANIEL HOLLER, Emergency Response Coordinator, Northwest Region, in an individual and official capacity, as agent of the DEP; MICHAEL McCABE, Regional Administrator, Region III, U.S. EPA; COLLEEN CALL, in her Official Capacity Only as Administrator of Tionesta Borough; UNITED STATES OF AMERICAN ENVIRONMENTAL PROTECTION AGENCY

(D.C. Civ. No. 95-cv-00342)

SUR PETITION FOR REHEARING

Appendix B

Present: BECKER, Chief Judge, SLOVITER, SCIRICA, NYGAARD, ALITO, ROTH, McKEE, BARRY AMBRO, FUENTES, and SMITH, Circuit Judges

The petition for rehearing filed by appellants in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied.

BY THE COURT,

S/ A. Scirica
Circuit Judge

Dated: Mar 28 2003
RLS/cc: JSS
SBM
MJS
BRS
JTS

Appendix B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

ROBERT W. GRINE, II, JOANNE D. GRINE AND MRS. MARGARET GRINE,	)	
Plaintiffs	)	
v.	)	Civil Action No. 95-342
	)	Erie
WILLIAM R. COOMBS, et al.	)	

ORDER OF COURT

AND NOW, this 26th day of September, 2001, for reasons set forth on the record during the status conference before this Court September 25, 2002,

the plaintiffs' motion to vacate this Court's previous orders [Doc. 270] is DENIED. Discovery is hereby extended to December 25, 2002. Dispositive Motions with Briefs not to exceed 25 pages are due **January 15, 2003**. Responses to Dispositive Motions with Briefs not to exceed 25 pages are due **February 4, 2003**. Plaintiffs' pretrial narrative statement is due **February 19, 2003**. Defendants' pretrial narrative statements are due **March 5, 2003**. A pretrial/settlement conference is scheduled for **March 10, 2003 at 10:00 a.m.** in Courtroom A, U.S. Courthouse, Erie, PA. Clients/representatives must be present in person with ultimate authority to settle the case. This case is scheduled for Jury Selection and Trial on **March 17, 2003 at 8:30 a.m.** in Courtroom A, U.S. Courthouse, Erie, PA.

S/_____
Sean J. McLaughlin
United States District Judge

cm: All counsel of record.th